

## CLIENT ALERT

### FTC Invokes "Deception" Authority Under Section 5 to Try to Curb "Patent Troll" Behavior

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While the policy debates continue as to whether, and how, the antitrust laws can be used to curb abusive practices by Patent Assertion Entities (PAEs), the FTC has entered the fray alleging for the first time under Section 5 that PAE MPHJ Technology Investments, Inc. (MPHJ) engaged in misrepresentation and deceptive practices through a large scale letter writing campaign. MPHJ, along with its owner and law firm, settled the FTC's claims by agreeing not to engage in unsubstantiated representations in the future. Although the FTC has long debated internally about the proper scope of the "unfair competition" half of Section 5, this seemingly novel application of the FTC Act's "deceptive practices" authority in fact reflects settled FTC power to prevent unsubstantiated claims.

The FTC alleged that MPHJ had deceived over ten thousand small businesses into paying millions of dollars in patent licensing fees. MPHJ's business model, according to the proposed complaint, was to acquire patents of dubious value and, through an outside law firm, send letters demanding royalty payments buttressed by deceptive claims that other market participants had taken more expensive licenses.

More specifically, the FTC's proposed complaint alleged that MPHJ, its owner, Jay Mac Rust, and its law firm, Farney Daniels, P.C., had purchased patents relating to networked scanning systems and sent letters to more than 16,000 small businesses demanding the businesses pay for licenses to MPHJ's patents. According to the FTC, each of the letters contained one or more false representations, including unsubstantiated assertions that many other companies had already agreed to purchase licenses, that other companies had agreed to pay up to \$1,200 per employee for the license, and that MPHJ and its lawyers were prepared to file a patent infringement lawsuit in federal court within two weeks of the date of the letter if the company did not take a license. According to the FTC, it was deceptive for MPHJ, Rust, and Farney Daniels to represent that litigation was imminent when the parties were in fact not prepared to initiate and did not intend to initiate legal action imminently.

Under the proposed settlement, MPHJ, its owner, and its law firm are barred from making unsubstantiated and deceptive representations when asserting patent rights. Those entities also agreed not to make any false representation that its patents had been licensed to a substantial number of licensees or at a certain price. In addition, they agreed not to make false representations that they had taken or would take action to file a lawsuit. Under the settlement, future violations could result in fines of up to \$16,000 per offending letter.

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The Commissioners voted to accept the proposed settlement 5-0. The proposed settlement will be subject to public comment until December 8, 2014, after which the Commission will decide whether to make it final.

The FTC's move against MPHJ demonstrates that the agency is willing to use well-settled Section 5 "consumer deception" authority to counter PAE activity. In so doing, the FTC has wielded its authority narrowly, staying well within settled law on deceptive practices. This settlement follows a broader initiative under its FTC Act 6(b) power for a comprehensive study of PAEs and other entities asserting patents in the wireless communications sector. This action doesn't solve the larger debate about antitrust law's role in addressing PAE activity, but strikes an equitable balance between the patent owners and those accused of infringing those patents. As Jessica Rich, Director of the FTC's Bureau of Consumer Protection, remarked regarding the settlement: "Patents can promote innovation, but a patent is not a license to engage in deception. Small business and other consumers have the right to expect truthful communications from those who market patent rights."

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